BORNEO HELICOPTERS SDN BHD A

v.

SABAHAIR AVIATION SDN BHD & ANOTHER CASE

HIGH COURT SABAH & SARAWAK, KOTA KINABALU B
ABDUL RAHMAN SEBLI J
[SUITS NO: K22-213-2009-III & K22-93-2009-III]
18 JUNE 2012

CONTRACT: *Agreement - Termination of - Whether there was* C
wrongful termination of agreement - Allegation of breaches of agreement - Failure to deliver bank guarantee within stipulated time - Whether destroyed essence of contractual relationship between parties - Whether there was misapplication of money - Whether Borneo Helicopters entitled to act in name of Sabah Air without Board of Directors' consent or approval - Companies Act 1965, s. 140(1) - Whether Borneo Helicopters falsely represented itself as being 100% Sabahan Bumiputra owned company - Whether Borneo Helicopters' claim against Sabah Air had merit D

CONTRACT: *Breach - Agreement - Termination of - Conspiracy to* E
defraud - Claim of - Whether there was a breach of duty owed by advocate and solicitor to its client - Whether there was a concerted and premeditated course of conduct calculated to benefit Borneo Helicopters at the expense of Sabah Air - Whether conspiracy proved

The plaintiff, Borneo Helicopters Sdn Bhd ('Borneo Helicopters') F
filed two suits against the defendant, Sabahair Aviation Sdn Bhd ('Sabah Air') which were consolidated, claiming, *inter alia*, that Sabah Air had wrongfully terminated the Management Agreement ('the agreement') and that Sabah Air forcefully prevented Borneo Helicopters from discharging its lawful duties and obligations under G
the agreement. Borneo Helicopters alleged that it had suffered loss and damages and claimed for payment of the management fees for the year 2008 amounting to RM2,453,266, liquidated damages amounting to RM46,612,054 or alternatively compensatory, exemplary and aggravated damages. Sabah Air on its part had H
counterclaimed against Borneo Helicopters, one Sunildeep Singh ('Sunildeep') and Messrs Ronny Cham & Co ('Ronny Cham & Co'), the latter two being Borneo Helicopters' director and legal counsel respectively. Sabah Air was alleging fraud, conspiracy, deception and abuse of process. I

Pursuant to the said agreement, Sabah Air appointed Borneo Helicopters as Management Contractor to carry out management services for Sabah Air. After the execution of the Memorandum of Understanding, the State Government appointed the late Haji Affendi Tun Fuad Stephens ('Haji Affendi') as the Executive Director of Borneo Helicopters, followed by the appointment of Sunildeep as Head of Business Development. By a memo dated 6 May 2009, Sabah Air's Board of Directors informed Borneo Helicopters that its representative, Sunildeep, and all its consultants engaged by them were to be relieved of their roles and responsibilities in Sabah Air. Subsequently, on 11 June 2009, Sabah Air terminated the agreement. Borneo Helicopters' case was that Sabah Air, or more precisely YB Datuk Pang Yuk Min ('YB Pang') who was later appointed the new Executive Chairman of Sabah Air had plotted with one Haji Abdul Ghani ('Haji Ghani') to terminate the agreement based on the "amicable surrender" of the agreement signed by the said Haji Ghani, a minority shareholder of Borneo Helicopters. It was contended that the amicable surrender was null and void and of no legal effect as the minority shareholder had no power to bind Borneo Helicopters. Further, it was submitted that the appointment of YB Pang and the removal of Sunildeep was a fundamental breach of the agreement entitling Borneo Helicopters to the damages as claimed.

The fundamental question that arose was whether the termination by Sabah Air of the agreement was wrongful and in breach of the agreement. The other issues that arose were, *inter alia* (i) whether cl. 6 of the schedule to the agreement expressly provides that Borneo Helicopters was to deliver a bank guarantee in the sum of RM500,000 to Sabah Air the moment the agreement was entered into; (ii) whether there was misapplication of money and unauthorised liability by Borneo Helicopters; (iii) whether Borneo Helicopters was the 'absolute manager having absolute management control' over Sabah Air; (iv) whether Borneo Helicopters was a 100% Sabahan Bumiputra owned company; and (v) whether a conspiracy claim was proved beyond reasonable doubt.

Held (dismissing Borneo Helicopters' claim; allowing Sabah Air's counterclaims):

(1) Sabah Air had, by letter dated 29 January 2009, pursuant to cl. 6.02.1(a)(i) of the agreement, wrote to Borneo Helicopters, telling them to deliver up the bank guarantee. By a letter dated 4 February 2009, Sunildeep had promised

that Borneo Helicopters would remedy the breach "as soon as practicable". Undoubtedly, this was an express admission by Borneo Helicopters that it had been in breach of the agreement by failing to deliver the bank guarantee within the stipulated time. Borneo Helicopters was fully cognizant of the 'remedy thereof within reasonable time' clause and was therefore estopped from denying any breach of the agreement. (paras 15-17)

(1a) There was nothing in the agreement when read along with the other provisions to exclude the inference that delivery of the bank guarantee by a particular date was intended to be fundamental. Although cl. 6.02.1(a)(i) provides for waiver for non-performance or non-observance by Borneo Helicopter of its obligations under the agreement but the non-performance or non-observance must be waived in writing by Sabah Air. No such waiver in writing had been proved by Borneo Helicopters. (para 40)

(1b) The persistent breach by Borneo Helicopters of cl. 6 of the agreement effectively destroyed the very root and essence of the contractual relationship between the parties and indeed the nature of the commercial venture contemplated by the agreement - that Sabah Air was to have the minimum profit guarantee independently secured by a collateral and security in the form of a bank guarantee. Construed in a commercially sensible manner, cl. 6 read with cls. 4, 5, 6 and 7.08 of the agreement could only mean that the bank guarantee must without fail be delivered the moment the agreement was entered into which by virtue of cl. 1.02(a) meant on 1 August 2008. This date had long passed when the RM500,000 bank guarantee was delivered by Borneo Helicopters on 28 May 2009. Thus, Borneo Helicopters' claim that the agreement was wrongfully terminated by Sabah Air was unsustainable. (para 41)

(2) It was undisputed that Sunildeep and Borneo Helicopters had appointed nine entities in purported performance of the agreement and in Borneo Helicopters' capacity as management contractor. The total liability incurred by Sabah Air following the appointments was RM815,872.85. Further, Sunildeep had also incurred liability on behalf of Sabah Air by entering into a Helicopter Lease Agreement with Layang-Layang Utara Sdn Bhd. This liability was incurred without the approval of Sabah Air's Board of Directors. Plainly these

were misapplications of Sabah Air's money by Sunildeep and Borneo Helicopters. There was no record of any request by Sabah Air for the services of these entities, which was a requirement of cl. 5.01(a)(v) of the agreement. (paras 44, 45 & 47)

(3) Borneo Helicopters' appointment as Management Contractor was to provide management services in return for which Borneo Helicopters was entitled to the management fees under the agreement. Therefore the costs for providing such services must be borne by Borneo Helicopters and not by Sabah Air. Borneo Helicopters was never appointed to run Sabah Air like a sole proprietorship and to undertake liabilities without obtaining Sabah Air's prior approval. Borneo Helicopters' duty to provide management services did not give Sunildeep *carte blanche* to deal with Sabah Air's money in any way he liked. Borneo Helicopters was not the 'absolute manager having absolute management control'. There was nothing in the agreement to entitle Borneo Helicopters to act in the name of Sabah Air without its Board of Directors' consent or approval or against its wishes. By virtue of the Companies Act 1965, it was illegal for Sunildeep to override the directors and shareholders of Sabah Air. No contractual term could exempt an officer (including a director) of a company from his duties and obligations towards the company (s. 140(1) of the Companies Act 1965). (paras 50-51)

(4) Sunildeep in his testimony candidly admitted that Borneo Helicopters' representation that it was a 100% Sabahan Bumiputra owned company was a 'blatant lie'. He himself was not a Sabahan, nor a Bumiputra, nor a native or otherwise a person of Sabah origin. It must have been intended by Borneo Helicopters and Sunildeep that the Registrar of Companies should be misled into believing that Haji Affendi was the true owner of the shares in question. The false representation persisted after the agreement was entered into and was never rectified. It is settled principle that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. (paras 53-55)

(5) For the claim of conspiracy to succeed Sabah Air must prove beyond reasonable doubt that Borneo Helicopters, Sunildeep and Ronny Cham had conspired to harm them. Sabah Air's

claim against Ronny Cham & Co was for breach of duty owed by an advocate and solicitor to its client, Sabah Air. Having regard to the totality of the evidence and the surrounding circumstances of the case, there was a concerted and premeditated course of conduct on the part of Ronny Cham & Co which was calculated to benefit Borneo Helicopters and Sunildeep at the expense of Sabah Air. Events that transpired after the signing of the agreement confirmed that Ronny Cham's undivided loyalty had always been with Borneo Helicopters, and this continued after the appointment of Ronny Cham & Co as solicitors for Sabah Air. Ronny Cham had failed in his basic duty to protect the interest of Sabah Air. Thus, conspiracy had been proved against Ronny Cham & Co beyond any reasonable doubt. (paras 57-58 & 61)

(6) Having considered the entire evidence, the probabilities of the case and the competing arguments carefully, it was clear that Borneo Helicopters' claim in this consolidated action had no merit. As for Sabah Air's counterclaims, on the evidence, they had been proved on the balance of probabilities. (para 72)

Case(s) referred to:

Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd [2010] 1 CLJ 269 FC ***(refd)***

Bristol v. West Building Society v. Mothew [1996] 4 All ER 698 ***(refd)***

British & Beningtons Ltd v. North Western Cachar Tea Company, Limited [1923] AC 48 ***(refd)***

Holman v. Johnson [1775-1802] All ER Rep 98 ***(refd)***

Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd [2007] 2 CLJ 127 CA ***(refd)***

Mannai Investment v. Eagle Star [1997] 3 All ER 352 ***(refd)***

Maredelanto Compania Naviera SA v. Bergbau-Handel GmbH The Mihalis Angelos [1970] 3 WLR 601 ***(refd)***

Miller v. Minister of Pensions [1947] All ER 372 ***(refd)***

NVJ Menon v. The Great Eastern Life Assurance Company Ltd [2004] 3 CLJ 96 CA ***(refd)***

Palaniappa Chettiar v. Arunasalam Chettiar [1962] 1 LNS 115 PC ***(refd)***

Prenn v. Simmonds [1971] 1 WLR 1381 ***(refd)***

Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v. Sharpe [1892] 1 Ch 154 ***(refd)***

Ridgway v. Hungerford Market Co [1835] 3 A & E 171 ***(refd)***

Taylor v. Oakes, Roncoroni & Co [1922] 127 LT 267 ***(refd)***

Universal Cargo Carriers Corporation v. Citati [1957] 2 QB 401 ***(refd)***

Legislation referred to:
Companies Act 1965, s. 140(1)
Contracts Act 1950, s. 56(1)
Evidence Act 1950, ss. 91, 92, 103, 114(g)
Rules of the High Court 1980, O. 18 rr. 8, 12

For the plaintiff - Norbert Yapp; M/s Norbert Yapp & Assocs
For the defendant - Mau Kam Peng; M/s Mau & Kadir

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Rahman Sebli J:

[1] The plaintiff, Borneo Helicopters Sdn Bhd ("Borneo Helicopters") has filed two suits against the defendant, Sabahair Aviation Sdn Bhd ("Sabah Air"), namely Suit No. K22-93 of 2009-III and Suit No.K22-213 of 2009. The two suits were consolidated on Borneo Helicopters' application. Sabah Air on its part has counterclaimed in both suits against Borneo Helicopters, Mr Sunildeep Singh Dhaliwal ("Mr Sunildeep") and Messrs Ronny Cham & Co ("Ronny Cham & Co"), the latter two being Borneo Helicopters' director and legal counsel respectively. Sabah Air is alleging fraud, conspiracy, deception and abuse of process against the three co-defendants.

[2] In Suit No. K22-93 of 2009-III, Borneo Helicopters is seeking, *inter alia*, for the following orders:

(1) A declaration that the memo issued by Sabah Air on 6 May 2009 pertaining to the "amicable surrender" of the Management Agreement ("the agreement") is null and void and of no effect;

(2) An order restraining the new Executive Chairman of Sabah Air from exercising any role or function which overrides, contradicts or is in conflict with the terms and conditions of the agreement until after the trial of the action.

[3] Suit No. K22-93 of 2009-III has however been overtaken by events, namely the termination by Sabah Air of the agreement which is the subject matter of Suit No. K22-213 of 2009. In Suit No. K22-213 of 2009 Borneo Helicopters is claiming, *inter alia*, that Sabah Air had wrongfully terminated the agreement and that

Sabah Air forcefully prevented or otherwise hindered and stopped Borneo Helicopters from discharging its lawful duties and obligations under the agreement. Borneo Helicopters alleges that it has suffered loss and damages and claims for payment of the management fees for the year 2008 amounting to RM2,453,266, liquidated damages amounting to RM46,612,054 or alternatively compensatory, exemplary and aggravated damages to be assessed.

[4] Initially Ronny Cham & Co were the solicitors for Borneo Helicopters, Mr Sunildeep and Ronny Cham & Co but on Sabah Air's application, Stephen Chung JC (as he then was) on 30 November 2010 ordered Ronny Cham & Co to cease acting as their counsel.

Subject Matter Of Suits

[5] The dispute centres around the agreement, which was entered into between Borneo Helicopters and Sabah Air on 29 April 2008 but deemed to have come into effect on 1 January 2008 for a period of ten years subject to periodical review at the end of every five years. It was pursuant to this agreement that Sabah Air appointed Borneo Helicopters as Management Contractor to carry out management services for Sabah Air as stipulated therein.

[6] The management takeover of Sabah Air by Borneo Helicopters was sanctioned by the State Government of Sabah, who owns 100% of Sabah Air. After the execution of the Memorandum of Understanding and as a preliminary step in the management takeover exercise the State Government on 22 September 2006 appointed the late Haji Affendi bin Tun Fuad Stephens ('Hj Affendi') as the Executive Director of Borneo Helicopters. This was followed by the appointment of Mr Sunildeep as head of business development on 30 October 2006. Haji Affendi passed away on 16 April 2009.

[7] By memo dated 6 May 2009 Sabah Air's Board of Directors informed Borneo Helicopters that its representative Mr Sunildeep and all consultants engaged by them were to be relieved of their roles and responsibilities in Sabah Air with immediate effect until further notice from the board. Subsequently on 11 June 2009 Sabah Air terminated the agreement.

[8] Borneo Helicopters' case is that Sabah Air, or to be precise YB Datuk Pang Yuk Min ("YB Pang") who was later to be appointed the new Executive Chairman of Sabah Air had a hidden

agenda to wrest back the management control of Sabah Air from Borneo Helicopters after the untimely death of Hj Affendi on 16 April 2009. It was alleged that YB Pang for his own selfish reasons and not for the interest of Sabah Air plotted with Hj Abdul Ghani bin Pindek, the minority shareholder of Borneo Helicopters to terminate the agreement based on the "amicable surrender" (of the agreement) signed by the said Hj Abdul Ghani bin Pindek on 6 May 2009.

[9] It was contended that the amicable surrender is null and void and of no legal effect as the minority shareholder had no power to bind Borneo Helicopters. It was submitted that the appointment of YB Pang as the new Executive Chairman and the removal of Mr Sunildeep as Executive Director and Chief Operating Officer of Borneo Helicopters was a fundamental breach of the agreement entitling Borneo Helicopters to the damages as claimed.

Bank Guarantee

[10] Clause 6 of the schedule to the agreement expressly provides that Borneo Helicopters was to deliver a bank guarantee in the sum of RM500,000 to Sabah Air the moment the agreement was entered into. Sabah Air's case is that Borneo Helicopters breached this term from day one of the agreement. There are three clauses that are relevant here, namely clauses 4, 5 and 6 and they are reproduced below to provide context:

> 4. Notwithstanding any provision to the contrary, in the event that Penerbangan Sabah's Group Adjusted Net profit for the first year of this Agreement as finalized in the audited account of Penerbangan Sabah shall be less than the sum of RM500,000.00 (calculated from the Commencement date to the 31st day of December 2008) the Management Contractor shall pay to Penerbangan Sabah the shortfall out of the sum of RM500,000.00 as Penerbangan Sabah's minimum guaranteed sum. The shortfall shall be calculated as the minimum guaranteed sum less the Group Adjusted Net Profit. In respect of the second year, the guaranteed minimum sum shall be RM800,000.00 and in respect of the remaining term of this Agreement, the sum shall be RM1,000,000.00. For the avoidance of doubt, the Management Contractor shall not be liable for any loss whatsoever which Penerbangan Sabah may suffer during the course of this Agreement.

5. The said guaranteed minimum sum shall be paid by the Management Contractor to Penerbangan Sabah within one (1) month from the date for the audited account for the relevant year.

6. The Management Contractor shall provide a Bank Guarantee on terms acceptable to Penerbangan Sabah for the full amount of the Minimum Profit Guarantee at the commencement of each financial year.

[11] By the terms of the above clauses Borneo Helicopters was obligated to deliver to Sabah Air bank guarantees for a minimum guarantee sum/minimum profit guarantee 'at the commencement of each financial year' as follows:

(a) in the sum of RM500,000 for the first financial year, ie, 1 January 2008 to 31 December 2008.

(b) In the sum of RM800,000 for the second financial year, which commenced on 1 January 2009.

(c) In the sum of RM1,000,000 for the remaining term.

The Key Issue

[12] The fundamental question in both suits is whether the termination by Sabah Air of the agreement was wrongful and in breach of the agreement. There is no definition of 'financial year' but cl. 1.02(a) defines 'commencement date' as 1 January 2008. Clause 6.02.1(a)(i) provides for the issuance of a default notice as a prelude to a possible termination. The clause is couched in the following terms:

> If the Management Contractor commits or suffers to occur any breach or default of the obligations on the part of the Management Contractor under this Agreement or any component of the Management Services and unless the non-performance or non-observance has been waived or excused in writing by, Penerbangan Sabah, Penerbangan Sabah shall give thirty (30) days notice in writing to the Management Contractor specifying the default and requiring remedy thereof within reasonable time and the Management Contractor defaulting.

[13] Clause 6.02(a)(ii) further provides:

> If the Management Contractor shall continue such default for sixty (60) days after the receipt of such notice referred to in Sub-clause (i) above Penerbangan Sabah shall, without prejudice to any other rights or remedies it may possess terminate this Agreement

A forthwith or the relevant component part of the Management Services by way of a notice in writing specifying when such termination shall take place.

[14] It is important to note that under cl. 6.02.1(a)(i), non performance or non-observance by Borneo Helicopters of its obligations under the agreement may be waived or excused by Sabah Air but on one condition, namely the waiver or excuse must be in writing. Clause 7.09 underscores the importance of the strict performance of the terms of the agreement by both Borneo Helicopters and Sabah Air. It stipulates as follows:

> The failure or delay of any party to insist in any one or more instances on the strict performance of any provision of this Agreement or to take advantage of any of its rights hereunder shall not be construed as a waiver of any such provisions or the relinquishment of any such rights but the same shall continue in full force and effect.

Default Notice

[15] By letter dated 29 January 2009 and pursuant to cl. 6.02.1(a)(i) of the agreement Sabah Air wrote to Borneo Helicopters, the material contents of which are the following:

> We will be grateful if you could confirm the status of the Bank Guarantee as stipulated in Clause 6 of the Schedule to the Management Agreement dated 29th April 2008 signed between Sabah Air Aviation Sdn Bhd and Borneo Helicopters Sdn Bhd.
>
> Your prompt attention in the delivery of the Bank Guarantee is much appreciated.

[16] It was a letter telling Borneo Helicopters to deliver up the bank guarantee pursuant to cl. 6 of the schedule to the agreement. About a week later, by letter dated 4 February 2009 Mr Sunildeep as Chief Executive Officer of Borneo Helicopters wrote to Sabah Air and this is what he said in the letter:

> We confirm that we are in the process of making arrangements for the Bank Guarantee to be issued in favour of Sabahair Aviation. We apologise for the delay which is mainly due to the recent festivities.
>
> I am in Kuala Lumpur this week for various Sabahair Aviation business meetings with the Department of Civil Aviation as well as other Sabahair business meetings.

> Please be assured that we are taking action to finalise the matter with our bankers and shall present the bank guarantee as stipulated in Clause 6 of the Management Agreement signed between Sabahair Aviation Sdn Bhd and Borneo Helicopters Sdn Bhd as soon as practicable.

[17] Undoubtedly this letter by Mr Sunildeep was an express admission by Borneo Helicopters that it had been in breach of the agreement by failing to deliver the bank guarantee within the stipulated time. It was also a promise by Mr Sunildeep that Borneo Helicopters would remedy the breach "as soon as practicable". It is evident from the letter that Borneo Helicopters was fully cognizant of the 'remedy thereof within reasonable time' clause. Borneo Helicopters is therefore estopped from denying any breach of the agreement.

[18] Is the default notice dated 29 January 2009 compliance by Sabah Air with cl. 6.02.1(a)(i) of the agreement? I would think so as it specified the default (status of bank guarantee which had yet to be delivered) and required remedy within a reasonable time (prompt action). In my view the operative words in cl. 6.02.1(a)(i) are "requiring remedy thereof within reasonable time". I am unable to accept Borneo Helicopters' contention that this clause should be interpreted to mean that Borneo Helicopters should be given a 30 day warning notice so that it could remedy the default specified in the notice within a reasonable time. Such construction would run counter to the 'reasonable time' requirement for remedial action. Reasonable time in the context of cl. 6.02.1(a)(i) means as soon as possible, not as late as possible.

[19] It is an undisputed fact that 30 days after receipt of the letter Borneo Helicopters did not deliver the bank guarantee. 60 days thereafter Borneo Helicopters had still not delivered the bank guarantee. The obvious consequence of this breach was that the minimum profit guarantee was not secured for Sabah Air. Borneo Helicopters' argument is that the provision for delivery of the bank guarantee is not a fundamental term of the agreement on the ground that under cl. 7 of the schedule, the failure to achieve the minimum guaranteed adjusted net profit for any given year shall not be construed as an event of default. With due respect the argument is tenuous as the issue is not about failure to achieve the minimum adjusted net profit but about failure to provide the bank guarantee as required by the agreement.

[20] Borneo Helicopters did finally deliver the bank guarantee of RM500,000 on 28 May 2009 but this was 113 days after Mr Sunildeep promised due compliance "as soon as practicable". This cannot by any measure of time be considered as compliance within 'reasonable time' of the default notice. It was submitted by Borneo Helicopters that since it had furnished the bank guarantee before the termination notice was issued it did not breach any of the terms regarding the bank guarantee. I find no merit in the argument as Borneo Helicopters' delivery of the bank guarantee for the sum of RM500,000 on 28 May 2009 was not effective compliance with cl. 6 of the agreement. In the first place the amount was wrong because the correct amount for the year 2009 was RM800,000 and not RM500,000. The amount of RM500,000 was meant for the first year and not the second year. The sum payable for the first year therefore remained unsatisfied by Borneo Helicopters. By failing to deliver the bank guarantee for the first year, Borneo Helicopters' breach had thus been carried over into the second year commencing on 1 January 2009.

[21] Due to this breach and for some other reasons Sabah Air on 11 June 2009 issued the notice of termination, in the following terms:

> NOTICE OF TERMINATION OF MANAGEMENT AGREEMENT
>
> Take notice that SABAHAIR AVIATION SDN BHD [24758][formerly known as Penerbangan Sabah Sdn Bhd], hereby gives you, BORNEO HELICOPTERS SDN BHD [744525-X], written notice of the termination of the Management Agreement dated 29 April 2008 entered into between SABAHAIR AVIATION SDN BHD [24758-U] [formerly known as Penerbangan Sabah Sdn Bhd] of the one part and BORNEO HELICOPTERS SDN BHD [74425-X] of the other part, *inter alia* for the following reasons:
>
> 7. Substantial and continuing breach of the Management Agreement by Borneo Helicopters Sdn Bhd, notice of which had been given to you by our letter dated 29 January 2009, of which you replied by letter dated 04 February 2009, promising remedy soonest thereafter, and of which some 133 days thereafter on 28 May 2009 you attempted to remedy but failed.

8. Deception and misrepresentation by Borneo Helicopters Sdn Bhd to the effect that Borneo Helicopters Sdn Bhd is 'a 100% Sabah Bumiputra owned company', which as admitted by your director, Mr Sunildeep Singh Dhaliwal, by sworn statement, is and was utterly untrue.

9. Illegality of and repeated unlawful and illegal acts of Borneo Helicopters Sdn Bhd in purported performance of the Management Agreement.

10. Necessary protection of the public interest of compliance of the law of aviation safety.

Further take notice that you are forthwith to cause all your personnel, directors, agents and servants not to enter or remain within any of our premises, and forthwith to cause to be returned to us all documents and properties of SABAHAIR AVIATION SDN BHD in your possession or that of your directors, agents and servants, are not authorized and are to cease to purport to in any manner to act or deal on behalf of or otherwise in the name of SABAHAIR AVIATION SDN BHD.

[22] Borneo Helicopters' response to the termination notice was to issue a demand letter and threat of legal action against YB Pang through a letter written by Ronny Cham & Co and signed by Mr Ronny Cham personally dated 15 June 2009. The material part of the letter reads as follows:

Our client, Mr Sunildeep Dhaliwal, as Executive Director of Sabahair Aviation Sdn Bhd, has instructed us to and we do demand that you will forthwith withdraw the said unlawful Notice of Termination of the Management Agreement, in default of which we have instructions to proceed with legal action against you personally.

[23] YB Pang did not accede to the demand and Ronny Cham & Co never did proceed with legal action against YB Pang personally. Instead by their pleadings Borneo Helicopters, Mr Sunildeep and Ronny Cham & Co overtly admitted that the Agreement had been terminated on 11 June 2009 and that Borneo Helicopters accepted the same but claims against Sabah Air liquidated damages according to the formula set out in cl. 6.03(ii) of the agreement.

[24] By the pleadings therefore Borneo Helicopters and Mr Sunildeep are estopped from denying that the termination notice is valid and had been duly served on Borneo Helicopters. For the same reason I find nothing in Borneo Helicopters' contention that

since the termination notice did not refer to any clause in the agreement nor any reference to any notice to remedy as required by cl. 6.02.1(a)(i), the service of the termination notice was done 'out of the blue and in bad faith'.

[25] As against the clear requirement for delivery of the bank guarantee under cl. 6 of the agreement, Mr Sunildeep had come up with evidence that at the side of the 205th Board of Directors meeting on 23 January 2009 he was verbally informed by the Permanent Secretary to the Ministry of Finance, one Datuk Yusoff bin Datuk Hj Mohd Kassim that there was no necessity to call upon any bank guarantee. The reason given for the alleged waiver was that Sabah Air had made a pre-tax 'phenomenal profit' in excess of RM6 million for the year 2008.

[26] First of all this is hearsay evidence and must be disregarded. It is trite law that the court has no discretion to consider hearsay evidence although not objected to by the opposing side. Secondly this is a matter of critical importance to Borneo Helicopters, yet there is nothing in writing to support the bare assertion. Thirdly, it is an attempt to circumvent ss. 91 and 92 of the Evidence Act, 1950 ("the Evidence Act").

[27] It was argued that adverse inference under s. 114(g) of the Evidence Act should be drawn against Sabah Air for failing to call the permanent secretary to rebut Mr Sunildeep's testimony. I do not think that is how the law works. It is Borneo Helicopters who wants the court to believe that such statement was made. Therefore by virtue of s. 103 of the Evidence Act it falls upon Borneo Helicopters discharge the burden of proof and not for Sabah Air to disprove the alleged statement.

[28] In any event I find it improbable that such statement had in fact been made by the permanent secretary. If indeed such oral waiver had been made by the permanent secretary, surely it would have been minuted at the meeting itself or contained in some official correspondence. No documentary evidence was produced at the trial from which this fact can reasonably be inferred. Every opportunity presented itself to Borneo Helicopters to place such an important statement on record, yet strangely this was never done. Borneo Helicopters was content with showing that profits had been made for the year 2008. With due respect the fact that profits were made in 2008 is not a fact from which an inference can be drawn that the statement must have been made by the permanent secretary.

[29] Even if such statement had been made no evidence was led to show that the permanent secretary had authority to bind Sabah Air. Clause 6.02.1(a)(i) of the agreement in clear terms provides that any such waiver by Sabah Air must be in writing. Further, no alteration or amendment was made to any term of the agreement pursuant to cl. 7.07 which provides as follows:

> The parties hereto may by mutual agreement review the provisions of this Agreement with a view to making any alterations or amendments or modification hereto which the Parties hereto deemed desirable in their mutual interest and to ensure that the provisions hereof operate fairly and equitably between themselves and with due regard to the changes in circumstances occurring since the date of this Agreement provided that no amendment, modification or alteration to this Amendment shall have any effect unless duly signed by both the Parties hereto.

[30] Mr Sunildeep's claim is also contrary and contradictory to what he wrote in his letter dated 4 January 2009 where he said that Borneo Helicopters was "in the process of making arrangements for the bank guarantee to be issued in favour of Sabahair Aviation", followed by an assurance that Borneo Helicopters would comply "as soon as practicable". If indeed the permanent secretary had made the statement as alleged, surely Mr Sunildeep would have mentioned it in his letter. If indeed such oral statement had been made, Mr Sunildeep would not have promised delivery of the RM500,000 bank guarantee, after the contractual right to terminate the agreement had accrued.

[31] To compound the matter this material assertion of fact was not even pleaded by Borneo Helicopters, bearing in mind the need for specific averment of the same with specific particulars under O. 18 rr. 8 & 12 of the Rules of the High Court, 1980. In the circumstances I reject Mr Sunildeep's evidence that there was such a statement by the permanent secretary. The term concerning the bank guarantee is a condition precedent to the agreement itself. By reason of the fundamental breach by Borneo Helicopters, the agreement became voidable at the option of Sabah Air.

[32] It is also a term of the agreement (cl. 2.03) that the management contractor shall not replace or remove the critical existing personnel in Sabah Air within a period of three years from the signing of the agreement. However Ms Kwan Siu Mei ("Ms Kwan"), the Company Secretary and Financial Manager of Sabah Air was removed from her post by Mr Sunildeep under the guise

of 'a promotion' to the position of General Manager of Intra Travel Sdn Bhd with effect from 15 June 2009. This was a blatant breach of cl. 2.03 of the agreement. The importance of Ms Kwan's position to Sabah Air has been explained by Mr Ronny Cham at QA19 of his witness statement:

> ... it was clear that the Ministry of Finance was most worried that Mr Sunildeep might transfer Puan Kwan Siu Mei, the Company Secretary and financial manager of the Company to some other subsidiaries of Sabah Air because usually, a new management will always take control of the financial department as the most important strategic move to solidify any form of restructuring following a management takeover. The State Attorney General was very adamant that the wishes of the shareholders to maintain Puan Kwan Siu Mei and other senior management staff must be given consideration and accordingly, the term of clause 2.03 proposed by the Attorney General was agreed by Mr Sunildeep.

Construction Of The Agreement

[33] The construction of a contract is a question of law to be determined by the court and the court is not bound by the admission of witnesses or the concession made by counsel: see for instance *NVJ Menon v. The Great Eastern Life Assurance Company Ltd* [2004] 3 CLJ 96 where the Court of Appeal held at p. 103:

> It would be noticed that we have in arriving at our aforesaid conclusion made no reference to the oral evidence led at the trial as to the meaning and interpretation of the contract between the parties. This is because the construction of a contract is a question of law for determination by the court and not by witnesses through their oral evidence.

[34] In *Kwan Chew Holdings Sdn Bhd v. Kwong Yik Bank Bhd* [2007] 2 CLJ 127 the Court of Appeal held that when a court is asked to determine the true nature of the bargain between the contracting parties it is required to take an objective approach and must have regard to the factual matrix forming the background to the contract to determine the objective aim or purpose of the transaction. It is the objective view based on the test of the reasonable man that is the determining factor and not the subjective view of a party to the contract.

[35] As for the requirement of reasons for termination it is trite law that when one party terminates a contract for the wrong reason or for no reason at all, that party may yet justify the termination if there were at the time facts in existence which would have provided a good reason. The fact that a contracting party gives a bad reason for terminating a contract does not prevent him from afterwards relying on a good one when he discovers it: see *Ridgway v. Hungerford Market Co* [1835] 3 A & E 171; *Taylor v. Oakes, Roncoroni & Co* [1922] 127 LT 267, 269; *British & Beningtons Ltd v. North Western Cachar Tea Company, Limited* [1923] AC 48, 71; *Universal Cargo Carriers Corporation v. Citati* [1957] 2 QB 401, 445; [1957] 2 All ER 70, 89; *Maredelanto Compania Naviera SA v. Bergbau-Handel GmbH The Mihalis Angelos* [1970] 3 WLR 601, 609.

[36] Being a commercial contract the agreement must be construed in a commercially sensible manner, that is to say, in a manner in which a reasonable commercial person would construe it. Lord Steyn in his judgment in the House of Lords case of *Mannai Investment v. Eagle Star* [1997] 3 All ER 352 stated the rationale for such an approach:

> In determining the meaning of the language of a commercial contract, and unilateral contractual notices, the law therefore generally favours a commercially sensible construction. The reason for this approach is that a commercial construction is more likely to give effect to the intention of the parties. Words are therefore interpreted in the way in which a reasonable person would construe them. And the standard of the reasonable commercial person is hostile to technical interpretations and undue emphasis on niceties of language.

[37] Having regard to the fact that Borneo Helicopters failed to provide the bank guarantee in breach of cl. 6 of the schedule to the agreement, there was therefore in existence at that time a fact which would provide a good reason for Sabah Air to justify termination of the agreement. This is so even if, as contended by Borneo Helicopters and for want of 'niceties of language' the termination notice did not refer to any clause in the agreement nor any reference to any notice to remedy as required by cl. 6.02.1(a)(i). It is therefore idle for Borneo Helicopters to point out that by virtue of cl. 6.02.1 neither party can terminate the agreement unilaterally except upon an "event of default".

[38] By cl. 7.08 of the agreement time is expressed to be of the essence. In this regard s. 56(1) of the Contracts Act, 1950 is relevant and provides as follows:

> When one party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

[39] But of course the fact that an agreement is time sensitive does not necessarily mean that a fundamental breach has taken place if any of the terms has not been complied with. What the court has to determine is the real intention of the contracting parties. In *Berjaya Times Square Sdn Bhd v. M-Concept Sdn Bhd* [2010] 1 CLJ 269 Gopal Sri Ram FCJ speaking for the Federal Court adopted the following observations by Chandrachud CJ in the Indian case of *Hind Construction Contractors v. State of Maharashtra* AIR [1979] SC 720:

> It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions of the contract and such other provisions may, on construction of the contract, exclude the inference that the completion of the work by a particular date was intended to be fundamental: for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of the contract.

[40] In the present case there is nothing in the agreement when read along with the other provisions to exclude the inference that delivery of the bank guarantee by a particular date was intended to be fundamental. It is true that cl. 6.02.1(a)(i) provides for waiver for non-performance or non-observance by Borneo Helicopters of its obligations under the agreement but the non-performance or non observance must be waived in writing by Sabah Air. No such waiver in writing has been proved by Borneo Helicopters.

[41] The persistent breach by Borneo Helicopters of cl. 6 of the agreement effectively destroyed the very root and essence of the contractual relationship between the parties and indeed the nature of the commercial venture contemplated by the agreement – that Sabah Air is to have the minimum profit guarantee independently secured by a collateral and security in the form of a bank guarantee. Construed in a commercially sensible manner cl. 6 read with cls. 4, 5, 6 and 7.08 of the agreement can only mean that the bank guarantee must without fail be delivered the moment the agreement was entered into which by virtue of cl. 1.02(a) means on 1 January 2008. This date had long passed when the RM500,000 bank guarantee was delivered by Borneo Helicopters on 28 May 2009. Thus, Borneo Helicopters' claim that the agreement was wrongfully terminated by Sabah Air is unsustainable.

Which Party Terminated The Agreement

[42] It was contended by Borneo Helicopters that the agreement was terminated by Borneo Helicopters and not by Sabah Air and that accordingly cl. 6.03(ii) of the agreement applies in its favour, entitling it to the liquidated damages in the sum of RM22,079,394, which is a revised sum from the claimed sum of RM46,612,054. This clause is in the following terms:

> If this Agreement is terminated by the Management Contractor pursuant to Clause 6.02.1(c) or Clause 6.02.1(d) or Clause 6.02.1(e) then Penerbangan Sabah shall pay a sum calculated on the basis of the following formula as liquidated damage:
>
> A X B = C
>
> A 50% of the Group Adjusted Net Profit of the year in which termination took place.
>
> B The total number of years remaining under the Agreement.
>
> C Sum of liquidated damage payable.

[43] With due respect the contention is otiose and contradictory to Borneo Helicopters' express pleading that Sabah Air terminated the agreement. The applicable provision in this respect is cl. 6.03(i) which stipulates as follows:

> If this Agreement or any component part of the Management Services is terminated by Penerbangan Sabah under Clause 6.02.(1)(a) or Clause 6.02.1(b) then Penerbangan Sabah shall pay the Management Contractor for work done up to the date of such termination a sum calculated on the basis of Clause 3.01 hereto;

A **Misapplication Of Money And Unauthorised Liability**

[44] It is undisputed that Mr Sunildeep and Borneo Helicopters had appointed nine entities in purported performance of the agreement and in Borneo Helicopters' capacity as management
B contractor. The total liability incurred by Sabah Air following the appointments was RM815,872.85. Each and every one of the payments made to these nine entities was signed and approved by Mr Sunildeep. The individual invoices and payment details of the liability are as follows:

C
(a) Rain Agency (RM52,000).

(b) Ink Angel Sdn Bhd (RM16,480).

(c) Siva & Associates (16,895.40).

D
(d) JBN Management Consultancy Services Sdn Bhd (RM120,402.90).

(e) E-Response Management Consultants (RM79,129).

E (f) Just Change Management consultants (RM106,683.30).

(g) Performance Consulting International (M) Sdn Bhd (RM143,036.65).

(h) Coepe Consulting Sdn Bhd (RM18,296.80).

F
(i) SA Strategic Advancement Sdn Bhd (RM271,948.80).

[45] Other than the appointment of these nine entities, Mr Sunildeep had also incurred liability on behalf of Sabah Air by
G entering into a Helicopter Lease Agreement dated 4 June 2009 with Layang Layang Udara Sdn Bhd, whereby Sabah Air was to lease a Eurocopter helicopter. The aggregate quantum of liability sustained by Sabah Air in respect of this lease agreement is the aggregate sum of RM1,092,333.33. It is also undisputed that this
H liability was incurred without the approval of Sabah Air's Board of Directors. Mr Sunildeep never obtained the approval of Sabah Air's Board of Directors before committing Sabah Air with such liability. It is pertinent to note that the lease agreement was prepared by Ronny Cham & Co and this was done when Mr
I Sunildeep had been relieved of all executive roles and responsibilities in Sabah Air to the knowledge of Ronny Cham & Co.

[46] Borneo Helicopters argued that Sabah Air is precluded from alleging that the leasing of the helicopter required the board's approval as it is recorded in the minutes of the 11 August 2008 Board of Directors' meeting that only the sale and purchase of aircraft would be under the direct purview of the Board of Directors. The contention is misconceived. The question is not what is and what is not within the purview of the Board of Directors. The question is whether approval by the Board of Directors was required for Mr Sunildeep to enter into the Helicopter Lease Agreement. The minutes of the 11 August 2008 Board of Directors' meeting cannot be taken as authority for Mr Sunildeep to enter into the lease agreement without the Board's approval. The mandate of the directors of a company to act for the company is one to be acted upon as a group and not one that is to be exercised alone. This also answers Borneo Helicopters' argument that the Ministry of Finance had directed Sabah Air to allow Mr Sunildeep to continue as executive director on 8 May 2009.

[47] Plainly these are misapplications of Sabah Air's money by Mr Sunildeep and Borneo Helicopters. Mr Sunildeep's explanation is that he had the power to take on and pay for those obligations on behalf of Sabah Air by virtue of the agreement. This contention is untenable as the exercise of the power is subject to Sabah Air's request. There is no record of any request by Sabah Air for the services any of these nine entities. This is a requirement of cl. 5.01(a)(v) of the agreement which stipulates, amongst others that Borneo Helicopters' responsibilities was to:

> Recommend, at the request of Penerbangan Sabah, such experts to carry out in whole or such part of the recommendations of the Management Contractor which Penerbangan Sabah is unable to undertake or complete.

Director's Liability To Company

[48] The rule is that where a director applies the money of a company without the express approval of the Board of Directors, and for which the Board of Directors does not subsequently expressly sanction or ratify, that director is liable to refund and account for the money so misapplied. The following passages in *Halsbury's Laws of England*, vol. 14 (2009) 5th edn, at paras. 585, 586 are relevant:

A 585 Directors' liability to company.

A company's directors, acting as such within their powers and within the powers of the company and without fraud, negligence or breach of fiduciary duty, incur no personal liability. Where, however, they expend the property of the company in a manner
B which is *ultra vires* the company, as, for example, in paying a dividend out of capital, or returning capital without legal reduction of capital, or making unauthorized investments, there is a liability on them to recoup any loss, and, if they occasion damage to the company by negligence, they may be liable to the extent of the
C damage caused. If they dispose of the company's assets in breach of their fiduciary duties they may be treated as having committed a breach of trust and a director who is himself the recipient of assets holds them upon a trust for the company.

586 Breach of trust by directors.

D

Although the directors of a company are not properly speaking trustees, they have always been considered and treated as trustees of company money or property which comes into their hands or which is under their control. A director who has misapplied or retained or become liable or accountable for any money or
E property of the company is treated as having committed a breach of trust and must make good the money or property so misapplied and account for any gains made by him.

…

F Where the money of the company has been applied for purposes which the company cannot sanction, the directors must replace it, however honestly they may have acted.

[49] Any claim of honesty is irrelevant in the circumstances. In
G *Re Sharpe, Re Bennett, Masonic and General Life Assurance Co v. Sharpe* [1892] 1 Ch 154 Lindley LJ said at p. 165-166:

This proposition is beyond dispute after the numerous decisions on this point, including the decision of the House of Lords in *Trevor v. Whitworth* (1). It was, however contended that, as the
H directors acted honestly and openly, and without in any way misleading the shareholders, the Court, though it might grant an injunction to restrain the continuance of an improper disposition of the funds of the company, would not go further and compel the directors to account for moneys actually misapplied. This contention was based on the judgment of the late Vice-Chancellor
I Wickens in *Pickering v. Stephenson* (2). But this Court has already had occasion to examine the soundness of this view, and has been

> unable to concur in it: see *Cullerne v. London and Suburban General Permanent Building Society* (3). As soon as the conclusion is arrived at that the company's money has been applied by the directors for purposes which the company cannot sanction, it follows that the directors are liable to replace the money, however honestly they may have acted. Whether they can in their turn get it back from those persons who received it is another matter; but their own liability to restore it is now clearly settled.

[50] Borneo Helicopters' appointment as Management Contractor was to provide management services in return for which Borneo Helicopters was entitled to the management fees under the agreement. Therefore the costs for providing such services must be borne by Borneo Helicopters and not by Sabah Air. Borneo Helicopters was never appointed to run Sabah Air like a sole proprietorship and to undertake liabilities without obtaining Sabah Air's prior approval. Borneo Helicopters' duty to provide management services did not give Mr Sunildeep *carte blanche* to deal with Sabah Air's money in any way he liked. The fact that Sabah Air did not object to the appointment of the nine entities and the Eurocopter deal is irrelevant. There must be positive authorization, not mere absence of objection.

[51] I am unable to accede to Borneo Helicopters' contention that Borneo Helicopters was the 'absolute manager having absolute management control' over Sabah Air. There is nothing in the agreement to entitle Borneo Helicopters to act in the name of Sabah Air without its Board of Directors' consent or approval or against its wishes. Indeed by virtue of the Companies Act, it would be illegal for Mr Sunildeep to override the directors and shareholders of Sabah Air. No contractual term can ever exempt an officer (including a director) of a company from his duties and obligations towards the company. This rule is encapsulated in s. 140(1) of the Companies Act which provides as follows:

> Any provision, whether contained in the articles or in any contract with a company or otherwise, for exempting any officer or auditor of the company from, or indemnifying him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void.

Deception

[52] Borneo Helicopters had represented that the company is a '100% Sabahan Bumiputra owned company' and that it is controlled by Hj Affendi. This is false of course. The undisputed record shows that Mr Sunildeep was holder of 46% of the shares in Borneo Helicopters and the shares were held by Haji Affendi as his nominee. Anyone dealing with Borneo Helicopters would be misled by such public and statutory records. In Borneo Helicopters' application for an *ex parte* injunction in connection with these suits Mr Sunildeep in his Affidavit in Support deposed at para. 3 as follows:

> I am the 46% shareholder of the Plaintiffs [BHSB] holding 460,000 shares. The other shareholders of the Plaintiffs are ABDL GHANI PINDIK (49%) and the late Tuan Haji Affendi Bin Mohd Fuad Stephens ... who passed away on 16.4.2009 (5%).

[53] Mr Sunildeep in his testimony under cross examination candidly admitted that Borneo Helicopters' representation that it is a 100% Sabahan Bumiputra owned company is a 'blatant lie'. He himself is not a Sabahan, nor a Bumiputra, nor a native or otherwise a person of Sabah origin.

[54] Borneo Helicopters argued that the contention of deception of public administration by Sabah Air offends against the parole evidence rule in that pre-contractual negotiations are inadmissible as decided by the House of Lords in *Prenn v. Simmonds* [1971] 1 WLR 1381, 1384. Reliance was also placed on cl. 7.04 of the agreement which expressly declares that the agreement supersedes all prior agreements or understandings, representations, warranties, inducements or conditions expresses or implied, oral or written. There is force in the argument but in my view the evidence is relevant to prove Mr Sunildeep's pattern of conduct in his dealings with Sabah Air in his capacity as director and Chief Operating Officer of Borneo Helicopters. It must have been intended by Borneo Helicopters and Mr Sunildeep that the Registrar of Companies should be misled into believing that Hj Affendi was the true owner of the shares in question. The false representation persisted after the agreement was entered into and was never rectified.

[55] It is settled principle that no court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act: see the judgment of Lord Mansfied in *Holman v. Johnson* (1775) 1 Cowper 341; [1775-1802] All ER Rep 98; see also *Palaniappa Chettiar v. Arunasalam Chettiar* [1962] 1 LNS 115.

Conspiracy Claim

[56] For the claim of conspiracy to succeed Sabah Air must prove beyond reasonable doubt that Borneo Helicopters, Mr Sunildeep and Mr Ronny Cham had conspired to harm them. Sabah Air's claim against Ronny Cham & Co is for breach of duty owed by an advocate and solicitor to its client, Sabah Air. On the facts the existence of a retainer can reasonably be implied notwithstanding the fact that no retainer fee was paid by Sabah Air to Ronny Cham & Co. The fact that Ronny Cham & Co acted as solicitor for Sabah Air is evidenced by, *inter alia* the express letter of appointment at encl. 86 p. 36.

[57] Having regard to the totality of the evidence and the surrounding circumstances of the case I am constrained to agree with Sabah Air that there was a concerted and premeditated course of conduct on the part of Ronny Cham & Co which was calculated to benefit Borneo Helicopters and Mr Sunildeep at the expense of Sabah Air. Mr Ronny Cham's involvement started as early as 2006, long before the agreement came into existence. This is not a case where Ronny Cham & Co only came on to the scene after the agreement was signed. What is clear from the evidence is that Mr Ronny Cham, Mr Sunildeep and Hj Affendi were in one mind when facing Sabah Air during the negotiation process for the agreement. It must be remembered that by then Hj Affendi, a State Government appointee and Mr Sunildeep had already assumed the posts of Executive Director and Head of Business Development respectively of Borneo Helicopters. Mr Ronny Cham's testimony reproduced below shows the nature of his involvement as legal counsel for Borneo Helicopters:

Q.3 Who has charge of the matter involved in this trial?

A I have, from the beginning until now.

Q.4 When and how you were instructed?

A I was instructed first by the late Tuan Haji Affendi Bin Mohd Fuad Stephens ("Tuan Haji Affendi") whom I knew when he was in his early 20s when he became the youngest Member of Parliament. Since then, we have kept in touch as friends. Sometimes in early 2006, he introduced to me a gentleman by the name of Mr. Sunildeep Dhaliwal ("Mr Sunildeep") and the two of them came to see me in my office and informed me of their intention to engage me to handle a management takeover of Penerbangan Sabah Sdn Bhd (as it was then called) ("Sabah Air"). The reason

> why they had come to see me was because at that material time, I won an Industrial Court case against Sabah Air, acting for one of its captains, Captain Gan Kiong Sing, who claimed against Sabah Air for unfair dismissal and was awarded a substantial sum in compensation. They said to me they wanted to engage me to deal with the management takeover exercise documentation because they wanted a lawyer who is able to take up a case against the Government or Government agency, such as Sabah Air.

[58] Now, this confrontational posture towards the State Government and Sabah Air as an agency of the State Government shows that from the start Mr Ronny Cham, in aligning himself with Mr Sunildeep and Hj Affendi had made up his mind where his loyalty would lie after the agreement was signed. Events that transpired after the signing of the agreement confirms beyond preadventure that Mr Ronny Cham's undivided loyalty had always been with Borneo Helicopters and never with Sabah Air, and this continued even after the appointment of Ronny Cham & Co as solicitors for Sabah Air. No other reasonable inference could be drawn from their avowed intention to take on Sabah Air. It therefore comes as no surprise that at the trial Mr Ronny Cham unabashedly reaffirmed his pledge of undivided loyalty to Borneo Helicopters, Mr Sunildeep and Hj Affendi and never to Sabah Air.

[59] It is true as pointed out by learned counsel for the three co-defendants that Ronny Cham & Co was sought after by the late Hj Affendi and Mr Sunildeep as their solicitors during the negotiation stage of the agreement but the reality is events that transpired after the signing of the agreement shows a pattern of conduct that shows a distinct bias towards Borneo Helicopters to the detriment of Sabah Air. The fact that Sabah Air was represented by legal counsel from the State Attorney General's Chambers does not alter the fact that the three co-defendants' actions after the signing of the agreement point to the fact that they had very little, if any regard for the interest of Sabah Air.

[60] Neither does it come as a surprise that when the agreement was entered into on 28 April 2008 Ronny Cham & Co distinctly failed to ensure that Borneo Helicopters delivered the bank guarantee to Sabah Air or otherwise to advise Sabah Air that Borneo Helicopters had not done that. The following evidence of Mr Ronny Cham under cross examination is revealing:

> Q: Did Ronny Cham & Co ensure that the RM500,000.00 Bank Guarantee was ready to be delivered by BHSB to Sabahair when the Management Agreement was entered into?

A: We have advised Borneo Helicopter but Mr Sunildeep instructed me that Datuk Yusoff who was the Permanent Secretary of the Ministry of Finance has agreed to defer this payment because 2008 was a good year for Sabahair under the management of Borneo Helicopter.

Q: Is that when the management agreement was entered into?

A: No, it was in early somewhere in 2009.

Q: I repeat my earlier question. Did Ronny Cham & Co ensure that the RM500,000.00 Bank Guarantee was ready to be delivered by BHSB to Sabahair when the management agreement was entered into?

A: I did but was told it was deferred that means they don't have to pay yet.

Q: When did you get this instruction from Mr Sunildeep that they don't have to pay?

A: Sometime in 2009 after the completion of the 1st year.

Q" Your instruction that they don't have to pay was not given to you when the management agreement was entered into, correct?

A: Yes, it was not. It was after they have completed the 1st year under the Agreement.

[61] It is plain that Mr Ronny Cham failed in his basic duty to protect the interest of Sabah Air. The least that he could have done was to advise Sabah Air against signing the agreement before the delivery of the bank guarantee or to remind Sabah Air that this obligation remained unfulfilled by Borneo Helicopters and to seek Sabah Air's written instruction before they proceeded to sign the agreement. Even after the agreement was entered into right up until the default notice was issued Ronny Cham & Co continued to remain silent on the bank guarantee requirement.

[62] Another indication of Ronny Cham & Co's apparent bias towards Borneo Helicopters was when Ronny Cham & Co by letter dated 22 July 2008 demanded a director of Sabah Air, Hj Ibrahim OKK Laiman Diki to sign within seven days the 'circular resolution' appointing Mr Sunildeep as Executive Director of Sabah Air. This was done after the said Haji Ibrahim was instructed by YB Pang the new Chairman of Sabah Air not to sign the document. YB Pang had earlier refused to sign the resolution as he was against it. According to Mr Ronny Cham he

A wrote the demand letter on the instruction of Mr Sunildeep. It is clear that Mr Sunildeep's and Mr Ronny Cham's intention was to circumvent or override YB Pang's refusal to sign the resolution. In cross examination Mr Ronny Cham was questioned on the letter dated 22 July 2008. The Q & A proceeded as follows:

B

Q : You stand by that letter?

A : Yes.

Q : In that letter Ronny Cham & Co stated 4 out of 5 directors had signed the resolution, correct?

C

A : Correct.

Q : The 4 directors who had signed that resolution are:

1. Encik Samson Chin.

D

2. Tuan Haji Affendi.

3. Datuk Haji Yusoff bin Datuk Hj Mohd Kassim.

Correct?

E

A : Yes.

Q : On 22 July 2008 when Ronny Cham & Co demanded Haji Ibrahim to sign the resolution, even if haji Ibrahim did sign it within the 7 days as demanded, that resolution would have no effect at all. Correct?

F

A : I do not know.

Q : You did not bother to find out?

G

A : No.

Q : A resolution under Art 81 is only effective when it has been 'signed by all the Directors for the time being'. Correct?

H

A : I have read just now and that is what it is stated.

Q : To circumvent YB Pang's refusal to sign the resolution, in order to have what would appear a valid Art 81 resolution, you would have to back date the resolution to give it false authenticity. Correct?

I

A : I have no knowledge.

Q : To give false authenticity you would have to back date the resolution to a date before YB Pang became a director of Sabahair. Correct? A

A : Not correct. The resolution was not drafted by me.

Q : That would be fraud. Correct? B

A : I cannot answer that question.

Q : That would be an offence. Correct?

A : I cannot answer that question as well. C

[63] For a legal practitioner of Mr Ronny Cham's experience and standing, his inability to confirm if the resolution was a fraud is unacceptable. On 11 August 2008 Mr Ronny Cham was present at Sabah Air's 204th Board of Directors meeting. In that meeting someone pointed out that it was not normal to have two Chief Executive Officers in the company, namely Mr Sunildeep and YB Pang. Mr Ronny Cham was recorded to have advised that the authority to manage the company was vested in the management contractor in accordance with the agreement and that the management contractor was acting on behalf of the board. Mr Ronny Cham even told the meeting that if anything went wrong as a result of mismanagement by Borneo Helicopters, Sabah Air could sue Borneo Helicopters as the management contractor. Mr Sunildeep on his part was recorded to have reminded the meeting that the contentious appointment of the three posts did not need the board's approval. It is clear that Mr Ronny Cham's concern was only with protecting the interest of Borneo Helicopters and none of Sabah Air. D E F

[64] On 7 May 2009 Ronny Cham & Co took legal action against Sabah Air, its own client and applied for and obtained an ex-parte injunction against Sabah Air while remaining on record as solicitor for Sabah Air. In the application Mr Ronny Cham used a false and fabricated Form 24 allegedly of the companies regulations made under the Companies Act. At this trial Borneo Helicopters, Mr Sunildeep and Ronny Cham & Co persisted in using that false Form 24 by including it in their bundle of documents at p. 88 of encl. 115. G H

[65] In his testimony Mr Ronny Cham admitted that he never sought a discharge from Sabah Air from being its solicitor. His stand is that there was no need for Ronny Cham & Co to seek a discharge. Learned counsel for Ronny Cham & Co stressed the I

point that the court action begun on 7 May 2009 was in respect of Sabah Air's breach of the agreement when YB Pang literally seized the management control of Sabah Air by staging a *coup d'etat* without the knowledge of the State Government. Even if that is so, Ronny Cham & Co's hostile action against its own client speaks for itself.

[66] Then on 4 June 2009 Ronny Cham & Co prepared and causing the helicopter lease agreement to be signed by Mr Sunildeep so as to bind Sabah Air when it ought to be plain to Mr Ronny Cham that Mr Sunildeep had no authority to do so and that no approval or sanction by Sabah Air's Board of Directors had been obtained. There can be no doubt that this was an act of conscious volition on the part of Ronny Cham & Co and could not have been an act of inadvertence. When asked in cross examination whether he stood by his conduct Mr Ronny Cham tersely answered "yes". When asked further if he wished to make amends for what he had done he answered in the negative and maintained that he had done everything professionally.

Duty Of fiduciary

[67] A fiduciary has a duty of fidelity and single-minded loyalty to his principal and the burden is on the fiduciary to show full disclosure and informed consent. The nature of this fiduciary duty was set out in *Bristol v. West Building Society v. Mothew* [1996] 4 All ER 698 where Millet LJ said at p. 711:

> The distinguishing obligation of fiduciary is the obligation of loyalty. This principle is entitled to the single-minded loyalty of his fiduciary. This core liability has several facets. A fiduciary must act in good faith; he must not make a profit out of his trust; he must not place himself in a position where his duty and interest conflict; he may not act for his own benefit or the benefit of a third person without the informed consent of his principal. This is not intended to be an exhaustive list, but it is sufficient to indicate the nature of fiduciary obligation ...

[68] The learned judge went on to describe the conflict of interest and breach of fiduciary duties in the following way:

> A fiduciary who acts for two principals with potentially conflicting interests without the informed consent of both is in breach of the obligation of undivided loyalty; he puts himself in a position where his duty to one principal may conflict with his duty to the other: see *Clark Boyse v. Mouat* [1994] 1 A.C. 428 and the cases there

cited. This is sometimes described as 'the double employment rule.' Breach of the rule automatically constitutes a breach of fiduciary duty.

[69] Mr Ronny Cham had clearly betrayed his principal, Sabah Air. By remaining as solicitor for Sabah Air while fighting for Borneo Helicopters' cause, clearly Mr Ronny Cham had placed himself in a position where his duty and interest conflict. The potential conflict is plain. Indeed Mr Ronny Cham had to be removed by a court order to stop him from acting as counsel for Borneo Helicopters in this consolidated action. His insistence on continuing to represent Borneo Helicopters shows his complete disregard for the rule against conflict of interest. His admission that his loyalty was with Borneo Helicopters is an overt abnegation of loyalty to Sabah Air and an admission of betrayal of the duty of undivided single minded loyalty.

[70] Mr Ronny Cham's display of bias towards Borneo Helicopters did not end with the filing of these suits and the grant of the *ex parte* injunction. After successfully obtaining the *ex parte* injunction on 7 May 2009 Mr Ronny Cham used the court order to threaten Sabah Air's Board of Directors with contempt proceedings in an attempt to stop it from holding its meeting. That meeting was crucial as it was to make the relevant decision in the face of the *ex parte* injunction. This was done through Ronny Cham & Co's letter dated 11 May 2009. The second and fourth paragraphs respectively of the letter read:

> We have been instructed by our clients that you are calling for a fresh meeting of the Board of Directors of SabahAir Aviation Sdn Bhd on 12th May 2009 to confirm (1) the minutes of the 206th Board of Directors' meeting held on 6th May 2009 and matters arising thereon, (2) on management issues in the light of the late Tuan Haji Affendi Tun Fuad Stephens' demise and (3) the acceptance of Standard Chartered Bank's banking arrangement issue.
>
> If you proceed with the meeting of the Board of Directors of SabahAir Aviation Sdn Bhd on 12th May 2009, in view of the subsistence of the above Injunction Order, we have strict instruction to proceed with contempt proceedings against you.

[71] It is obvious that Mr Ronny Cham's unwavering loyalty to Borneo Helicopters had made him blind to the fact that Sabah Air was also his client. The intention clearly was to stifle Sabah Air and to prevent it from making the relevant decisions at the

meeting. This was a clear abuse of the court order. I am satisfied that conspiracy has been proved against Ronny Cham & Co beyond any reasonable doubt. What constitutes proof beyond reasonable doubt has been explained by Lord Denning in *Miller v. Minister of Pensions* [1947] All ER 372 in the following terms:

> Proof beyond reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with the sentence 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.

Conclusion

[72] Having considered the entire evidence, the probabilities of the case and the competing arguments carefully it is clear to me that Borneo Helicopters' claim in this consolidated action has no merit and ought to be dismissed. As for Sabah Air's counterclaims against the three co-defendants I am satisfied, on the evidence that they have been proved on the balance of probabilities.